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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

Nos. 172 and 173

GEORGE A. COLE, ED MALLEY, GILBERT C. ROSS

et al., Petitioners

vs.

JOSEPH RALPH, *Respondent*

BRIEF FOR PETITIONERS

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STATEMENT

These were adverse suits under Section 2326 of the Revised Statutes of the United States.

The respondent, defendant below, on August 1, 1914, filed application for patent for the alleged Salt Lake No. 3. Midas, Evening Star and other lode claims.

The Guy Davis placer was located by the predecessors in interest of petitioners on September 6, 1913, and covers substantially the same ground as the Salt Lake No. 3 lode claim; and the Homestake placer was located by the predecessors in interest of petitioners on September 26, 1913, and conflicts with the Midas and Evening Star lode claims.

The locators of the placer claims, upon making discovery, immediately defined their boundaries, performed the necessary work under the statutes of Nevada, and recorded their location certificates and commenced and continued mining operations until restrained at the suit of the immediate predecessor in interest of the defendant below.

Within the sixty-day period of publication on the respondent's application petitioners filed their adverse claims in the Land Office, and within thirty days thereafter commenced these actions in the Third Judicial District Court of the State of Nevada in support of their said adverse claims, asking for decrees for possession and to be declared to be the owners of the Guy Davis and Homestake placers. The causes were removed to the Federal Court for the District of Nevada, consolidated for trial and, upon stipulation, tried before a jury.

The petitioners, as plaintiffs, contended that said alleged lode claims were void for want of discovery and introduced testimony tending to prove that no lode or vein had been discovered or known to exist within the limits thereof up to the time the placer locations were made.

The respondent introduced testimony of the parties who had made the locations of the lode claims and other witnesses (including the respondent himself, a mining engineer) as to alleged discoveries of lodes prior to the locations of the placers, and other testimony tending to show possession of the lode locations, the character of the work which had been done and improvements made thereon, and contended ultimately that the local statute of limitations

of Nevada, applying to mining claims, and Section 2332, Revised Statutes of the United States, had operated as a statute of repose to perfect title to the alleged lode claims and foreclose inquiry into the question of discovery as a necessary prerequisite.

At the close of the testimony petitioners, as plaintiffs, submitted various requests for instructions upon the question of what constitutes a discovery sufficient to support a lode location (R., pp. 1202-08).

The respondent, as defendant, submitted (R., p. 1208 *et seq.*) various requests for instructions upon the subject of title by adverse possession, two of which incorporated discovery as an essential element (R., p. 1213 at bottom, and p. 1218 at top of 1219, the latter appearing as No. 17, R., p. 96), and others which ignored discovery as an essential element (No. 6, R., p. 87; No. 8, R., p. 89; No. 16, R., p. 95), and also prayers upon the subject of discovery.

The trial judge made the following announcement (R., p. 1202):

> "I don't think there is any adverse possession in the case, so the instructions based on adverse possession will not be given; I exclude them, not because they do not correctly state the law, but simply because I regard them as unnecessary. The instructions with reference to assessment work will be eliminated with this statement: The plaintiffs have tendered no issue as to the performance of the assessment work, therefore they cannot recover in this case solely on the ground that there was a failure to perform the assessment work."

And at the close of the argument the trial judge, after instructing the jury as to the elements necessary to constitute valid discovery of a lode, also instructed them as follows:

> *"It appears here—and I think it is conceded by both parties—that not only the lode locations, but the placer locations, were properly staked, notices were placed, and certificates which complied with the law were recorded in the recorder's office;* and practically the only question involved, as I have indicated before, is the question as to whether a *valid discovery had been made by the lode locators prior to the time when the placer locators went on* the ground." (R., p. 1225.)
>
> "But through all your deliberations you are to remember that the date when the placer locations were made or attempted is the date to which you are to pay special attention. Any location work performed on the lode claims prior to that time by Mr. Ralph, or by any of his grantors, will inure to his benefit even though there was no valid discovery at the time of the original locations; if a valid discovery was made before the placer locators entered, it is sufficient." (R., p. 1232.)

And the court further instructed the jury that without discovery there is no location (R., p. 1225), as to what constitutes a vein or lode within the meaning of the lode mining law (R., p. 1230), and that each party was in a sense an actor and the burden was upon each to establish the validity of his own location (Act of March 3, 1881, 21 Stat. 503), but that the burden was upon the plaintiffs in the first instance to show that when they went upon these claims to locate the placers the ground was open to location, and that there were no valid subsisting locations when their discoveries were made and notices posted. (R., p. 1236.)

The jury returned general verdicts for the plaintiffs and (under the local Nevada practice) special verdicts finding that no valid discovery of a lode or vein had been made within the boundaries of the several lode claims in question prior to the time of the locations of the placers (R.,

pp. 1232-34); and judgment was entered for the plaintiffs, petitioners here.

The case went to the United States Circuit Court of Appeals for the Ninth Circuit upon a writ of error, and on March 8, 1918, by opinions and judgments (R., p. 1272 *et seq.;* 249 Fed. 81) the judgments were reversed and the cases remanded for a new trial. On May 13, 1918, a petition for re-hearing was denied.

ARGUMENT

Two general questions are presented for the consideration of this Court:

1. Whether error was committed in refusing to give instructions on the subject of adverse possession which included proof of discovery as an essential element, when the court had instructed the jury that the only question was whether the lode locations were supported by discovery.

2. Whether error was committed in refusing to give instructions on the subject of adverse possession which omitted mention of discovery as an essential element.

We will discuss the questions presented in the order named, also discussing hereafter certain other questions passed on in the opinions of Justice Ross and Justice Hunt of the Circuit Court of Appeals but which were not raised or presented by any exceptions taken at the trial.

I

WHETHER ERROR WAS COMMITTED IN REFUSING TO GIVE INSTRUCTIONS ON THE SUBJECT OF ADVERSE POSSESSION WHICH INCLUDED PROOF OF DISCOVERY AS AN ESSENTIAL ELEMENT, WHEN THE COURT INSTRUCTED THE JURY THAT THE ONLY QUESTION WAS WHETHER THE ALLEGED LODE LOCATIONS WERE SUPPORTED BY DISCOVERIES.

This question, we think, answers itself, for it was unnecessary to give instructions on adverse possession which included discovery as an essential element, for the reason that it was admitted by all parties, and the court so instructed the jury, that the alleged lode claims of respondent were properly monumented and recorded, and the annual assessment work performed thereon, and that if the lode claimants had made discoveries prior to the locations of the placers, the respondent was entitled to the ground in controversy. (R., pp. 1225, 1232.)

It was, therefore, only necessary for the defendant to prove discovery to the satisfaction of the jury—if the jury had returned a special verdict in favor of discovery on any of the lode claims, the ground therein would have belonged to defendant without further finding of any other fact.

Overman S. M. Co. vs. Corcoran, 15 Nev. 147, 152.

II

WHETHER ERROR WAS COMMITTED IN REFUSING TO GIVE INSTRUCTIONS ON THE SUBJECT OF ADVERSE POSSESSION WHICH OMITTED MENTION OF DISCOVERY AS AN ESSENTIAL ELEMENT.

This question resolves into:

(a) Whether the Nevada statute of limitations, in terms or effect, dispenses with proof or discovery as an essential element, and

(b) Whether such statute so construed would be void as violative of the fundamental principle of the federal mining law that discovery is a condition precedent and an essential element of a mining claim.

These questions involve the effect and operation of Section 2320, U. S. R. S., which declares that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located," and Section 2332, U. S. R. S., which provides:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

and the Nevada statute of limitations (Act of November 21, 1861, as amended in 1867, Cutting's Compiled Laws of Nevada, 1861-1900, par. 3706, Sec. 4) which provides:

> "No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All provisions of this act, which apply to other real estate, so far applicable, shall be deemed to include and apply to mining claims: Provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and provided further, that when the terms 'legal title' or 'title' are used, they shall be held to include title

acquired by location or occupation, according to the usages, laws and customs of the district embracing the claim."

THE EFFECT AND OPERATION OF SECTION 2332, R. S. U. S.

This section, quoted *supra,* provides that where the claimant has held and worked his claim for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working for the statutory period shall be sufficient to establish a right to a patent thereto "under this chapter, *in the absence of any adverse claim.*"

In Reavis vs. Fianza, 215 U. S. 16, this Court held that under section 45, chapter 1369 of the Philippines Act of July 1, 1902, 32 Stat. 691 (corresponding to U. S. R. S. 2332), the right to a patent to a mining claim was equivalent to a right to the thing itself, that is, a right of the kind that equity specifically enforces. In that case, however, there was no question of discovery. The controversy was over known mines which Fianza or his ancestors had actually worked and, undoubtedly, also, as said by the Court, the statute was enacted for the purpose of protecting the natives in their possession of *mines* under the law as it existed in the Philippine Islands prior to American occupation and the enactment of the statute.

In Belk vs. Meagher, 14 Otto, 278, where also there was no question of discovery, this Court, construing U. S. R. S. 2332, said:

> "Under the provisions of the Revised Statutes relied on Belk could not get a patent for the claim he attempted to locate, unless he secured what is

here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough and kept all others out, his right to a patent would be complete. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force."

And the purpose of Section 2332 is well stated in McGowan vs. McLay, 16 Mont. 234, 40 Pac. 602:

"We are of opinion that this section was enacted to meet cases where applicants for a patent have been in possession of their claims for a period of the statute of limitations, but were unable to make full proof of their rights to a patent, as required by the previous provisions of the law; and to excuse their defects in title Congress determined that the Land Office should pass over such defects, and give them their patents, provided no one appeared to contest their applications. It would appear that the section was enacted to prevent an applicant from failing to obtain his patent simply for defects in his claim, when he had held a long, undisputed possession, and no one had opposed him. The Land Office, under such circumstances, was thus authorized to omit some of the strict proof required from an applicant in consideration of there being no opposition to the application. But if an adverse claimant did appear, the contest should be referred to a court of competent jurisdiction for determination as in other cases."

See also Humphreys vs. Idaho G. M. D. Co., 21 Idaho, 126, 120 Pac. 823, 826, 827 (cited in the dissenting opinion of Gilbert, C. J.), where it is said:

> "It seems to us that the provisions of Section 2332 of the Revised Statutes of the United States are intended to obviate the necessity for proof of posting and recording a notice of location in cases where the claimant to mineral ground has been in the actual, open and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate. The adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the county recorder.
>
> *"It still remains, however, for the person who asserts claim by adverse possession to have made a mineral discovery," etc.*

Also, Upton vs. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 282; U. S. vs. Midway Northern Oil Co., 232 Fed. 619, 634, 635.

We think there can be no question as to the construction to be given to the section in question. Its purpose is manifest. It is not a statute of limitations. It is a part of the chapter on mining and mineral resources and merely dispenses with acts of location and claim, other than discovery, in the absence of an adverse claim. It does not dispense with the necessity of complying with Section 2320 U. S. R. S., which requires discovery as a necessary prerequisite to the location or appropriation of mining ground. To hold otherwise would be to strike from the statute itself the words "in absence of any adverse claim" and would set at naught the provisions of Section 2320, which declares, "but no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

Numerous decisions affirm the rule that location can rest only on actual discovery and that without discovery no right can be acquired save the right to retain possession while diligently seeking discovery.

McLemore vs. Express Oil Co., 112 Pac. (Cal.) 59;
King vs. Amy Silver M. Co., 152 U. S. 222, 227;
Mining Co. vs. Tunnel Co., 196 U. S. 337, 345;
Jupiter M. Co. vs. Bodie, 11 Fed. 666;
Steele vs. Tanana M. Co., 148 Fed. 678;
Garibaldi vs. Grillo, 120 Pac. 425, 426;
Erwin vs. Perego, 93 Fed. 608, 611;
Book vs. Justice M. Co., 58 Fed. 106, 111;
Round Mt. M. Co. vs. M. Co., 36 Nev. 543, 560;
U. S. vs. M'Cutchen, 238 Fed. 575;
U. S. vs. Midway N. Oil Co., 232 Fed. 619, 626;
Multnomah M. Co. vs. U. S., 211 Fed. 100, 101, 102;
Overman vs. Corcoran, 15 Nev. 147, 152;
Gleeson vs. Martin W. M. Co., 13 Nev. 442, 457.

In Erwin vs. Perego, *supra,* the Court said:

> "The acts of Congress prescribe two and only two prerequisites to the vesting in a competent locator of complete possessory title to a lode mining claim. They are the discovery upon the unappropriated public domain of the United States within the limits of his claim of a mineral bearing lode, and the definite marking of the boundaries of his claim so that they can be readily traced. No appropriation of land is made until both these requirements are fulfilled, and until that time the lode and the land sought are open to location and appropriation by any competent locator."

The Supreme Court of Nevada, in Round Mountain M. Co. vs. Round Mountain Sphinx, 36 Nev. 543, 560, said:

"Discovery is the most important of all of the acts required in the proceedings culminating in a perfected title. It is the foundation of the right without which all other things are idle and superfluous."

In Garibaldi vs. Grillo, 120 Pac. 425, 426, the Supreme Court of California said:

"The stipulation referred to was 'that the land in controversy is unpatented placer mineral land of the United States'; the parties were competent to stipulate as to their contended and conflicting rights, but they could not by stipulation relieve themselves from proving at the trial that they had made a discovery of gold either in placer or in veins or lodes as contemplated by the laws of the United States. Discovery is the source of the miner's title and is an essential requisite to a valid location and must precede the location, and the rule applies alike to lode and placer."

The Supreme Court of Nevada, in Overman S. M. Co. vs. Corcoran, 15 Nev. 147, 152, in an opinion by Judge Hawley, said:

"If the findings of the Court as to the non-existence of any vein or ledge of gold, silver or other metalliferous bearing ores, earth or rock, is sustained by the evidence, then the second and third points (as above stated) relied upon by appellants, need not be considered, for under the laws of Congress no valid location of a mining claim can be made until a vein or deposit of gold, silver or metalliferous ore or rock in place has been discovered." (Gleeson vs. Martin White M. Co., 13 Nev. 457.)

In Beals vs. Cone, 62 Pac. 948, 952, the Supreme Court of Colorado said:

"The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits, Section 2320, Rev. Stats. U. S. Until such discovery no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location are not imperative except as against the rights of third parties. If the necessary steps outside of discovery are not taken within the time required by law but are complied with before the rights of third parties intervene, they relate back to the date of location, but not so with discovery, for it is upon that act that the very life of a mineral location depends; *and from the time of such discovery only would the location be valid,* provided, of course, that others had not previously acquired rights therein."

In U. S. vs. M'Cutchen, 238 Fed. 575, the Court said:

"Under the laws of the United States, as the same have been enacted from time to time and as they have been construed by the courts, I think it may be safely asserted that one who enters upon the public domain and 'locates' land for its mineral contents, as oil land, though he may erect proper monuments and post and properly file location notices, *if he makes no 'discovery' of mineral,* acquires no rights of any nature against the Government or any private individual, save the right to proceed with diligence to effect an actual discovery of mineral, gas or oil."

* * * * *

"It is hornbook law, of course, that the successful location or appropriation of mineral land of any sort, to be valid, must be accompanied by 'discovery.' * * *

"In this behalf I can see no escape from the conclusion that, as against the Government, if the defendants had made such a location or 'discovery' upon the land in question as to invest them with the right of property therein, they have made such location and 'discovery' as to entitle them, as a matter of law, and of right, to a patent. Conversely, if they have made

no such discovery as to entitle them to a patent as against the Government, they have made no such discovery as to vest them with rights in and to the property. McLemore vs. Express Oil Co., 158 Cal. 559, 563, 112 Pac. 59, 139 Am. St. Rep. 147."

We think it manifest from the decisions cited that no possession of a so-called mining claim can ever ripen into adverse possession until there be "discovery" within the meaning of the statute, for no appropriation is made until the requirement of discovery has been fulfilled. A locator without discovery is a mere licensee upon the public domain; his appropriation and possession vest only when he has complied with the requirements of the statute. He has no possession of the mining claim as a whole and the most that he can have in the absence of discovery is *pedis possessio* (Gemmel vs. Swain, 28 Mont. 331, 72 Pac. 662), and that only while he is with diligence prosecuting work for the purpose of making a discovery.

Ophir S. M. Co. vs. Carpenter, 4 Nev. 538, 97 Am. Dec. 550;
McLemore vs. Express Oil Co., 112 Pac. (Cal.) 59;
U. S. vs. Midway N. Oil Co., 232 Fed. 619, 626.

And in the case at bar, the main opinion of the court below, per Ross, C. J., concedes the fundamental principle that there cannot be a mining claim without discovery, and that until discovery the ground is open to valid location by any one who first makes discovery thereon, saying:

"That discovery of a vein or lode within its boundaries is essential to the validity of any lode claim is beyond question, and the law is well settled that at any time previous to such discovery ground within the boundaries of such a claim, although within the actual possession of the claimant, is open to the entry of others by any lawful means for the purpose of loca-

ting it under the mining laws. See the numerous cases cited in the recent case of Consolidated Mut. Oil Co. vs. United States, 245 Fed. 521."

It must also be borne in mind that this is an adverse suit commenced under the provisions of Section 2326 of the Revised Statutes. The Government of the United States is a *quasi* party. The prevailing party in the proceeding may take a certified copy of the judgment roll in the action and upon filing it together with a certificate of the Surveyor General as to the requisite expenditures, improvements and description of the claim, and making payment of the proper fee, is entitled to patent for the claim or such portion thereof as he recovers by the decision of the court (Section 2326, U. S. R. S.). And if neither party to the controversy establishes title to the ground in controversy, the jury must so find and judgment is entered accordingly, and the claimant is not permitted to proceed or obtain patent from the Land Office until he has perfected his title (Act of March 3, 1881, 21 Stat. 505).

The purpose of the mining law was to throw open the public domain to discoverers of mineral, not to mere locators of mining claims or those who locate for mere speculative purposes. It is an offer of reward by the Government to the diligent. Section 2332 has not changed this rule or dispensed with the necessity of first making a discovery as a necessary prerequisite of location and appropriation of public mineral land of the United States.

STATUS, EFFECT AND OPERATION OF THE NEVADA STATUTE OF LIMITATIONS

The Nevada statute of limitations (quoted *supra*) does not undertake to dispense with the requirements of Section 2320, R. S. U. S. as to discovery, but if it does so, or such construction be given it, it is void.

Butte City Water Co. vs. Baker, 196 U. S. 119.

The Nevada statute—

1. Bars the remedy in any action for the possession or recovery of a mining claim unless the plaintiff was seized or possessed of such mining claim within two years before the commencement of the action.

2. Defines the elements of adverse possession.

We think the trial court properly refused the instructions requested for the reason that under the undisputed facts in the case the remedy was not barred nor was adverse possession established.

The respondent and his predecessors located the lode claims in 1897, and maintained a casual possession up to the time the placer locations were made in the fall of 1913. In all of the period from 1897 to 1913, the time of location of the placers, the respondent and his predecessors certainly did not hold open, notorious and adverse possession against the petitioners, because petitioners' rights were not initiated until the fall of 1913, when they made their discoveries and located the placer claims.

These suits were filed less than two years after the placers were located.

It is the contention of respondent and his counsel that the fact that they held possession of the ground in controversy for more than two years, the statutory period, prior to the placer locations, dispensed with all of the requirements of the statute of the United States as to discovery—that mere occupation and possession for the statutory period took the place of discovery and the requirements of location. We think, however, that the correct rule is laid down in McTarnaham vs. Pike, 27 Pac. 784, where the court said:

> "It is claimed that the third finding is not justified by the evidence, but as the statute of limitations did

not run against the Government, and less than two years intervened between the date of plaintiff's entry and the commencement of this action, the finding that defendant acquired no title by adverse possession, whether a fact or a conclusion of law, is correct. For the mere purpose of proving title by prescription, defendant's alleged adverse possession before plaintiff entered and paid for the land counted for nothing."

The Nevada statute of limitations provides also that all provisions of the act (limitations of actions) which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims.

The Supreme Court of Nevada in McDonald vs. Fox, 20 Nev. 364, 368, in an opinion by Judge Hawley, has defined the elements necessary to constitute adverse possession. The court said:

"The actual and peaceful possession of land does not necessarily make the possession adverse to the true owner. It depends upon the intention of, and the character of the claim asserted by, the party in possession. The possession, to be adverse, must be inconsistent with the title of the true owner, who is out of possession, and of such a character as to operate as a notice to him that possession is held under a claim of right, or a color of title sufficient to establish the ouster of the owner."

To constitute adverse possession, mere possession, no matter how open or notorious, is not sufficient unless there be some repugnacy. As said in Pickett vs. Pope, 74 Ala. 122, 131:

"And if there be no other person entitled to present possession, there can be no repugnacy, actual or constructive, between the possession of the occupant and the rights of any one else. A possession to be ad-

verse must operate to disseize or oust some other claimant of his possession or right."

Ouster is a necessary element, for, as said in Pioneer Wood Pulp Co. vs. Chandos, 78 Wis. 576, 47 N. W. 661, 662:

> "To constitute 'adverse possession' which gives title to real estate under the statute of limitations, two things must concur: (1) An ouster of the real owner followed by an actual possession by an adverse claimant; and (2) an intention on the part of the latter to oust the owner and possess for himself the property."

See also Ivy vs. Yancy, 31 S. W. 937, 938, 129 Mo. 501.

And this court, in construing the Nevada statute of limitations relative to mining claims, has held that the statute does not begin to run until after ouster.

Taylor vs. Union M. Co., 100 U. S. 37; 25 L. Ed. 541.

In the case at bar there was never any possession on the part of the defendant or his grantor repugnant, adverse, or hostile, either actual or constructive, to the rights of the petitioners, the placer claimants, for the statutory period of two years, and our remedy was, therefore, not barred. Moreover, during all of the period from the location of the lode claims until the location of the placers there was manifestly no repugnancy or adverse claim against the placer claimants, nor was there any ouster of the placer claimants thereafter which continued for the statutory period. Their rights were acquired, as appears by the undisputed facts, in the fall of 1913. These suits were commenced in September, 1914, within thirteen months after the placer claims were located.

The case of The 420 Mining Company vs. Bullion Mining Company, 7 Nev. 240 (cited by Justice Ross in support of his opinion), which recognizes the right to acquire a mining claim by adverse possession, is not inconsistent with the views here expressed, but on the contrary, is entirely in harmony therewith, for an examination of the facts in that case discloses that a mining claim was located by The 420 Mining Company as the original locator, that it was forcibly ejected from the ground by the Bullion Mining Company, and the Bullion Mining Company held possession for the statutory period openly, notoriously and adversely *against* The 420 Company, the original locator, for seven years prior to the commencement of the action, and the findings as set forth in the decision of the Court disclose that the Bullion Company not only claimed title during all of that period but claimed it adversely to the 420 Mining Company; and in that case there was no question as to discovery.

Moreover, we most earnestly urge:

That the character of the possession of the respondent and his predecessors was not such as is required by the statute to confer title by prescription. The statute reads:

> "Occupation and adverse possession of a mining claim shall consist in holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof."

As pointed out in the dissenting opinion of Gilbert, C. J., the respondent pleaded adverse possession but not in the language of the Nevada statute. He merely alleged possession, "holding, living and working upon such lode mining claim." There was no evidence that the alleged lode claims, or any of them, had ever been worked or developed as a mine. On the contrary, the evidence was that nowhere

had an ore body been developed or had ore ever been extracted from any workings upon the claims. Not a single shaft was sunk upon a vein. Not a single shaft upon the ground reaches a depth of ten feet in hard rock, or rock in place of any kind.

While not essential to the argument, it is proper to notice briefly the testimony to which Gilbert, C. J., referred in his dissenting opinion:

John J. Healey, a witness on behalf of the plaintiffs, testified (R., pp. 294-295), that he did not find anything in the nature of a lode or vein which would justify exploration or work and that there had never been any mining work done.

W. T. Moran, a witness for the plaintiff, testified (R., pp. 358-359) that, eliminating the work done by placer claimants, there was no work in the nature of shafts, cuts, or crosscuts, which, in his judgment, constituted lode mining or which would tend to develop a lode mine.

John Jorey, a witness for the *defendant*, and who was one of the persons who located the Salt Lake No. 3 for J. H. Clive, and who had been on the ground practically continuously from 1885, testified (R., pp. 588, 589, 590), that other than the road up to the mill and the grading for the mill there had not been, to his knowledge, up to September 6, 1913 (date of placer location), any mining operations carried on on that ground; that during that period the Salt Lake No. 3 had never, to his knowledge, been worked as a mine; that there had never been, to his knowledge, any sinking of shafts, cuts, or excavations, for the purpose of getting underground and developing an ore body.

Joseph Jory, a witness for the *defendant* who was also one of the parties who located the Salt Lake No. 3 for J. H. Clive, and who resided on a ranch nearby and was

frequently on the ground, testified (R., pp. 617-618) that outside of the excavation for the mill and grading the road, and sinking of a shaft in the southeast corner of the claim (which was in wash and had not extended to bed rock), there had been no mining done on the Salt Lake No. 3.

Joseph Jurey, a witness for the *defendant*, who had been in his employ for many years, testified (R., pp. 663-668) that the annual labor on the Salt Lake No. 3 from 1898 to 1911 consisted in repairing the pipe line and repairing the houses (R., pp. 670-673); that the annual labor on the Evening Star and Midas for the years 1908-1911 was performed on the Eagle Tunnel, the portal of which is 600 feet east (and which does not extend in the direction of the claims in question), and that the annual labor on the Salt Lake No. 3 for 1912 was the mill and the grading for the road.

The mill was dismantled in 1913 before the placers were located (Joseph Ralph, R., p. 1056).

Jurey also testified (R., pp. 689-692) that he had lived on the Salt Lake No. 3 every year but one since 1898, and that from 1898 up to the present time he could not say that there had been any mining work done on that claim; that from 1898 to the end of 1913 the Salt Lake No. 3 was never worked as a mine.

This is the undisputed evidence in the case.

This evidence does not show "holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof"; and this was the position taken by Gilbert, C. J., in his dissenting opinion, 249 Fed. 95:

> "The requested instruction, which was refused, was framed in the language of the statute of limitations of Nevada. It was refused, evidently, because the trial court found that there were in the evidence no

facts to constitute such adverse possession. In so holding the trial court was clearly right. There was no evidence whatever that the lode claim has ever been worked 'in the usual and customary manner of holding and working similar claims in the vicinity,' or had ever been worked at all. All the proof of work done on the lode mining claim prior to the plaintiffs' placer locations was proof to show that the annual assessment work had been done. That work consisted in sinking shafts, and excavating tunnels on the claims; but in none of them and nowhere on any of the claims was an ore body developed and from none of them was any ore ever taken, and in none of them was there any 'working' of a claim. No witness testified that either of the claims had been worked in the usual and customary mode of holding and working similar claims. It seems too clear to require discussion that doing the annual assessment work, building a road on the claim, or erecting a structure upon it is not working the same as a mining claim. The statute of Nevada can avail the holder of a mining claim by adverse possession only upon the theory that the claim has been shown to be a workable claim, and that the act of working it involves discovery and stands for proof of discovery. If the defendant claimed adverse possession under the statute of Nevada, it was for him, not only to plead the statute, but to prove compliance with the same in all particulars."

And, referring to the question of whether or not adverse possession, or possession for the statutory period, can supply the place of discovery, Judge Gilbert further said (249 Fed. 96):

"I submit that the decision of the majority of the court wholly disregards the provisions of that statute, and commits this court to the proposition that in Nevada mining land, or indeed any land, may be acquired as against all except the United States by filing a location notice, marking the ground and doing

the annual assessment work for a period of two years, and without making a discovery. Such is not the law. * * *

"I submit that it (the Nevada statute) would have been void, for it is a fundamental doctrine of the mining law that one who locates and occupies and does the annual assessment work on mineral land cannot hold the same against another who peaceably, and not fraudulently or clandestinely, locates the ground and is the first to make discovery thereon."

Moreover, we most respectfully urge that the words "mining claims," as used in the statute of limitations of Nevada, should be given their technical meaning, and the statute should so be construed as meaning an appropriation of public mineral land upon which a discovery had been made, for a mining claim cannot come into existence until a discovery has first been made.

We desire here to call the Court's attention to the concurring opinion of Hunt, C. J., wherein he quotes the following instruction, which he says should have been given:

"The court instructs the jury that if you find from the evidence that the defendant and his grantors had entered into and held possession of the lode mining claims involved in these actions and worked the same in the usual and customary way in the vicinity thereof, for a period of two years *prior to the making of* the placer locations of the plaintiffs, *then the law presumes in aid thereof that all the acts necessary to a valid location of said lode mining claims, had been done and performed* at the time of such lode mining locations, and that *such possession (having the effect of a location under the law) is sufficient to give defendant's grantors a lawful right to the possession of said mining claims*, if kept alive as required by law, as against the subsequent placer locations of the plaintiff's grantors."

We most respectfully submit that this instruction was

not proper and did not correctly state the law. Moreover, it did not even meet the requirements and is widely divergent from Judge Hunt's view of the law as set forth in his opinion (which we submit is error):

> "This evidence made a strong *prima facie* conclusion as against the placer claimants in favor of discovery by defendant. It *established a presumption whereby the truth of a discovery was to be assumed,* and the legal consequences attaching to it, and *the burden thrown upon the plaintiff by reason of the presumption,* should have been explained to the jury. As a general rule the benefit of such a presumption is specially important in a mining case, for it might very properly, in a case otherwise difficult to solve, save the rights of a mine owner as against one who, after many years have gone by, seeks to maintain another location, contending that there never was a discovery by the original locator. Common experience tells us that death or inability to gather witnesses often makes it practically impossible to prove as an affirmative physical fact an *original discovery of mineral at the time of location. The presumption should serve as evidence in favor of the claimant until his opponent has produced evidence which overthrows the presumption.*"

The instruction requested was in effect that possession for two years prior to the making of the placer location created a conclusive presumption in aid of the lode claim that all acts necessary to the location of the lode claim had been done and performed, and that such possession has "the effect of a location under the law." The instruction was that a conclusive presumption, irrebuttable in law or fact, was established by a mere two years' possession and working of the lode claim. The instruction requested failed even to state that possession for the statutory period established a mere presumption of discovery, in the nature

of evidence, which could be overthrown by the plaintiffs in the action.

The respondent intended this instruction to create an irrebuttable presumption in his favor and the record discloses that this was his theory. We call the court's attention to the exception of the defendant to the charge of the court (R., p. 1230):

> "On the further ground that the undisputed evidence of the *prior adverse possession* of the ground embraced within said three lode mining claims by defendant's grantors according to law, for more than two years *prior* to the initiation of the Guy Davis or the Homestake locations, is the full equivalent of all the acts and steps required by law to make or initiate valid mining locations of each of said lode claims, *including discovery of mineral and other necessary acts of location, and evidence is not admissible to overthrow the presumptions of ownership and title* created by the statute of limitation."

Nor has the theory of defendant been changed or modified, but has been reiterated in this Court. We refer the Court to the Brief of Respondent on Motion to Dismiss Petition for Certiorari, p. 57, wherein he says:

> "—became sustained by absolute and irrebuttable presumptions of law which could not be overcome by any allegation or proof of non-compliance with law in any particular going to the initiation of the claim as a mining location.
>
> "Not an iota can be deducted from this statement without giving a judicial repeal to the statute itself (Section 2332), and reversing the settled decisions of this Court and of the other Federal and State courts. Because if irrebuttability and indisputability be taken away, the sole distinction between mining claims before and after the bar of the statute is abolished, and any alleged ground of invalidity may be litigated as well before as after the bar occurred."

See also same Brief, p. 61.

We submit that no instruction was requested to the effect that the long-continued possession or possession for the statutory period created a presumption of discovery in favor of the defendant, the burden to overcome which would be thrown upon the plaintiffs below. No request was made to the court to give an instruction even substantially complying with the language of Judge Hunt's opinion, nor was any request made for an instruction which would even substantially conform to the rulings in Harris vs. Equator M. Company, 8 Federal, 863, or Cheeseman vs. Hart, 42 Fed. 98. No request was made to the Court for instruction upon presumption at all, and we most respectfully submit that no error occurred in failing to give an instruction of that kind when none was requested.

III

NEITHER RECITALS IN LOCATION NOTICES NOR MERE POSSESSION AND CLAIM FOR ANY PERIOD CAN CREATE A PRESUMPTION OF DISCOVERY

At the outset we called attention to the fact that the opinions of Judge Ross and Judge Hunt held that recitals in location notices and certificates, and possession and claim for the statutory period, create a presumption of discovery.

No requests were made by the defendant asking the trial court to instruct the jury that recitals in the location certificates created presumptions of discovery in the nature of evidence in his favor, nor was any request made to the trial court to instruct the jury that long-continued possession for the period of the statute of limitations, created a presumption of discovery in favor of the defendant. We think, also, that the majority of the court below erred in their opinions in that regard:

1st. *With respect to recital in a location notice.*

To hold (main opinion of Ross, C. J.) that self-serving recital in a location notice creates a presumption of discovery of mineral, is to hold, that, in case the plaintiff in an adverse suit fail, the defendant may introduce his location notice reciting discovery and, upon the presumption thereby created, secure a directed verdict or judgment.

That such a judgment would not be binding on the land department is obvious. Clipper Mining Co. vs. Eli Mining Co., 194 U. S., 220, and 33 L. D., 660, 34 L. D., 401.

But aside from this, and aside from the self-evident proposition that a right against the United States cannot be created by such a self-serving recital in a location notice, either directly or indirectly through the operation of a presumption, the ruling in the opinion of Ross, C. J., is opposed to the rulings of the Supreme Court of Nevada and to the settled doctrine in all of the other mining States.

In Fox vs. Myers, 29 Nev. 169, 186 (86 Pac., 793), the Supreme Court of Nevada said:

> "It will be seen that our statute has gone farther and makes it the duty of the locator, after he has made a discovery, to put his location notice at such point of discovery. *Proof of posting a location notice at a certain point, containing a recital therein that a discovery had there been made,* as in the case of the Ramsey Extension notice, *would not be evidence prima facie of a discovery,* as contended for by counsel for appellant, for the reason, if for none other, that the statute does not require the making of such a declaration in the notice."

And in Round Mountain Mining Company vs. Round Mountain Sphinx M. Co., *supra,* the same court said:

> "It is well settled that the basis of location is discovery and that the mere posting of a notice without a discovery is of no force or effect so far as render-

ing invalid another location covering a portion of the same ground based upon a valid discovery."

The rule is succinctly stated by Lindley (on Mines, vol. 2, 3d ed., sec. 392), approved in Round Mt. Co. vs. Mining Co., *supra:*

> "Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. A record of a certificate of a location which recites the citizenship of locators, the fact of discovery and the fact that the location had been marked upon the ground so that the boundaries could be readily traced, is not evidence of any of these facts in any of the States, for the simple reason that no such facts are required to be stated in any of the statutory notices.
>
> "Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.
>
> "While many of the States require the date of the discovery to be stated in the recorded certificate this would not be evidence of the *fact* of discovery. A discovery once proved, such a record would, *prima facie*, fix the date. Discovery is the most important of all the acts required in the proceedings culminating in a perfected location. But it is not a matter of record, but *in pais*, and if controverted must be proved independently of the recital in the certificate. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three States (Idaho, Montana and Oregon) the certificate is executed with no solemnity. It is neither acknowledged nor sworn to. It is a mere *ex parte*

self-serving declaration on his own behalf of the party most interested. The same may be said of marking the boundaries."

To the cases cited by Lindley may be added Childers vs. Laham (New Mex.), 143 Pac., 924.

Upon examination none of the cases cited in the main opinion of Ross, C. J., herein, will be found to involve the particular question now under consideration. They will be commented upon under the next following head hereof.

In Thomas vs. South Butte Mining Co., 211 Fed., 106, Gilbert, C. J., speaking for himself and Ross and Morrow, Circuit Judges, distinguished Vogel vs. Warsing and Cheesman vs. Hart, saying (p. 107):

> "The mere fact that mineral lode locations were made is not proof that the ground on which they were located contained a vein or lode within the meaning of Section 2333 of the Revised Statutes (U. S. Comp., 1901, p. 1433). A mere location of an alleged vein or lode is not sufficient to prove that a vein or lode was known to exist. Migeon vs. Montana Central Ry., 77 Fed., 249; 23 C. C. A., 156. * * *
>
> "Where mining claims which have passed out of the hands of the original owners have stood unchallenged for years, *and have been developed to a considerable extent*, the certificate of location, if in due form, may be deemed presumptive evidence of discovery and of a valid location. Vogel vs. Warsin, 146 Fed., 949; 77 C. C. A., 199; Cheesman vs. Hart (C. C.), 42 Fed., 98. But in the absence of such grounds for indulging in presumption in favor of the integrity of the location, it is held that the location notice is, when recorded, *prima facie* evidence only of what the statute requires it to contain, and which is therein sufficiently set forth. Strepey vs. Stark, 7 Colo., 614; 5 Pac. 111; Flick

vs. Gold Hill & L. Ming. Co., 8 Mont. 298; 20 Pac. 807; Bismarck Gold M. Co. vs. North Sunbeam Gold Co., 14 Idaho 516; 95 Pac., 14. Revised Statutes 2324 (U. S. Comp. St., 1901, p. 1435) require that the certificate of location shall contain the names of the locators, the date of the location and such a description of the claim by reference to some natural object or permanent monument as will identify it. The certificates of prior lode locations submitted in evidence by the appellant complied with the statute under which they were made. But they are not proof of discovery or of the existence of a vein or lode which would justify exploitation, *and especially should this be held where there is no evidence that the claims were ever developed,* and that they were not abandoned."

And in the present case Gilbert, C. J. (dissenting), said:

"Our decision in Vogel vs. Warsing, 146 Fed., 948, 951; 77 C. C. A. 199, sustaining a *prima facie* presumption of discovery, and other similar cases cited in the opinion of the majority of this court herein, have no application to the present case. There is no place here for the indulgence of a presumption of discovery. The question of discovery by the lode claimant was directly placed in issue. It was a question of fact. It was the principal issue in this case. The defendant presented all his available testimony to show actual discovery. The jury by special verdicts on that issue alone found that there was no discovery."

2d. *As to long-continued possession and claim.*

Likewise, to hold (concurring opinion of Hunt, C. J.) that mere long-continued possession and claim and doing of work (not mining) create a presumption of discovery of mineral, is to hold that in case a plaintiff in an adverse

suit fail, the defendant may prove such mere long-continued possession and claim and doing work and, upon the presumption of discovery thereby created, secure a directed verdict or judgment.

That such judgment would not be binding on the Land Department is likewise obvious. Clipper Min. Co. vs. Eli Mining Co., *supra.*

Upon the facts of the present case (set forth in the dissenting opinion and more fully hereinbefore) the land department would hold that failure to develop a mine after such ample opportunity to do so, was evidence that the alleged mining claims were invalid for want of discovery. Brophy vs. O'Hare, 34 L. D. 596; Purtle vs. Steffee, 31 L. D., 400.

In Multnomah M. & M. Co. vs. U. S., 211 Fed. 100, 101-2, the court said:

> "Among the items of evidence which may be adverted to as supporting this conclusion, is the fact that in all the years since their location no mining has been done upon these claims."

Bearing in mind that we are here concerned with an adverse suit wherein it was incumbent upon the defendant to prove his right of possession under the Federal mining law, that is, that his alleged claims were valid locations supported by discovery, and where it appears that the parties who made the original locations were available and were produced as witnesses to testify to alleged discoveries at the time of location, that the issue was not confined to discovery at the time of location but the defendant was given opportunity to establish the validity of his claim by proof of discovery at any time before the location of the placers, and that there was no evidence of any development of a mine or actual mining work, Vogel vs. Warsing and the other cases cited in the main opinion of Ross, C. J., lose pertinency.

Could those cases be regarded as authority even for a limited application of the principle in support of which they were cited, the controlling distinction would lie in the fact that here the majority of the court below would establish *by means of presumption alone* the fact of the existence of veins or lodes supporting the lode claims, whereas in Vogel vs. Warsing and the other cases the existence of a vein or lode or actual mine or mineral deposit was established by proof and the question was narrowed to whether or not the original locators had discovered it at the time of location.

It will be appreciated that so long as the existence of a vein or lode is established, the Federal statute is satisfied, and the jury were so instructed here. In such a case the issue may narrow the question to which of the adversary claimants was the first discoverer or which first complied with the law in other respects. If the original locator or other witnesses cannot be produced to testify to the facts regarding discovery at the time of location, the proof of the existence of a vein or lode, mine, or deposit, may be of such character as in itself to sufficiently establish the fact of discovery thereof by the original locator. From the degree of conclusive proof the probative force of the facts may shade down to disappearance. It was with such situations that the courts in the cases cited in the main opinion of Ross, C. J., were attempting to deal.

In Vogel vs. Warsing the matter before the court was an appeal from an order denying an application, made at the beginning of ejectment proceedings, for injunction *pendente lite*. In support of the application for injunction it was contended that the original location of the Panorama claim must be regarded as void because it did not appear by affidavit that a discovery of gold was made at the time of location. Gilbert, C. J., delivering the opinion of the Cir-

cuit Court of Appeals in that case, disposed of that contention as follows:

> "The appellees, who claim to own the Panorama claim, are Clum, Cochran and Briggs. They claim to be owners as purchasers, and not as locators. As the original locator and his witness were absent from Alaska, their affidavits could not be obtained. The validity of the location had been unchallenged for more than five years and up to the time of the commencement of the present action. It has been held that under such circumstances the certificate of location creates a presumption of discovery of mineral and of a valid location. Harris vs. Equator M. & Smelting Co. (C. C.), 8 Fed., 863; 5 McCrary, 14; Cheesman vs. Shreve (C. C.) 42 Fed., 98. Especially should such a presumption be indulged in a summary proceeding instituted at the beginning of a suit where the granting or withholding of an injunction depends upon facts presented by affidavits and rests largely in the discretion of the trial court, and where a subsequent locator attacks the title of the prior locator or that of his successor in interest. In view of these considerations we are not authorized to say that the court erred in denying the injunction sought for, on the ground that the location notice failed to mention the discovery of gold on the claim, and this conclusion is aided by the affidavit of Warsing, who had a lay on the claim and deposed that pay had been discovered by him and his colessees, and that 'gravel' on said claim is exposed on the surface on many parts thereof and carries fine gold throughout, so that panning from the surface is easily done and colors are easily found."

It will be observed that that case was not one of recital of discovery in the certificate of location but of absence therefrom of such recital. The decision went to the point that on such an application for preliminary injunction, addressed in large measure to the discretion of the court, and

under the particular circumstances of the case as set forth in the opinion, it could not be assumed that the original locator had made the location without discovery.

Gilbert, C. J., who wrote the opinion in that case, disposed of it in his dissenting opinion in the present case, as already noticed, by saying that it had no application here for that there was here no place for the indulgence of a presumption of discovery.

In Harris vs. Equator M. & S. Co., 8 Fed., 863, there was evidence to show that the lode in question was discovered (apparently by the original claimant) in 1867 and the plaintiffs attempted to show a valid location according to the law in force in that year, but failed and were forced to rely on possession in themselves and their grantors (p. 864). Hallett, District Judge, on motion for new trial said (p. 865) that, conceding that the title to, and the right to occupy, the public mineral lands can be acquired only in the manner prescribed by law, it does not follow that a locator in actual occupancy, who has been evicted by a wrongdoer, must give evidence of every fact necessary to a valid location in an action to recover possession—not on the ground that the essentials of a valid location are in any cases to be omitted, but that in support of undisturbed possession long enjoyed, a presumption may in some cases arise that the location was at first well made—referring, of course, to matters of posting, marking, recording, etc.

Cheesman vs. Shreve, 40 Fed. 787, may be disposed of by Lindley's note (on Mines, Vol. 2, 3d ed., sec. 392, note 16):

> "Judge Phillips, in his charge to the jury, in Cheesman vs. Shreve, 40 Fed., 787, 791; 17 Morr. Min. Rep., 260, said that certificates of location are presumptive evidence of discovery. But in this case, many years elapsed between the original location and the litigation, *and the fact of discovery was supported*

by the testimony of the parties. Under these circumstances the judge held that every reasonable presumption should be indulged in favor of the integrity of the location. The reasoning, while persuasive, so far as this case is concerned, does not militate against the views announced in the text."

In Cheesman vs. Hart, 42 Fed., 98, the particular issue was whether or not the original locator had made discovery at the time of location. All of the subsequent workings went to show the existence of a lode or vein on the claim of more or less importance. The original locator could not be produced. Phillips, J., in denying motion for new trial, after referring to the evidence, said (p. 102):

> "Possibly the charge in this particular would have been more theoretically correct had the court told the jury that it was not necessary that defendants should establish such discovery by witnesses to the physical fact at the time, but the same might be inferred from the certificate of location, the manifestations of workings done, the long tenure of the claim, *the development of a vein on the claim by subsequent working,* and from all the surrounding circumstances."

Judge Phillips thus recognized that it was not a question of presumption in the legal sense, but of permissible inference from established facts.

Here, there was no ground for even inference of the fact of discovery from the established facts. The original locators were present and testified to alleged discoveries made by them at the time of location. The jury either rejected their testimony or found that what they testified to did not amount to the discovery of a vein or lode under the instructions of the court on that subject. And the undisputed evidence was that no vein or lode had been developed or worked—no mining work had been done. As

said by Gilbert, C. J., in his dissenting opinion, there was no room for any presumption on the subject of discovery. And, as we have reiterated, no instruction was asked on that subject and no exception presenting that question appears in the record. The defendant apparently was satisfied with the court's instruction to the jury that the burden was on the plaintiffs in the first instance to show that when they went on the ground to locate the placers it was not embraced in a valid subsisting location.

Respectfully submitted,

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